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IN THE

Supreme Court of the United States

October Term, 1923
No. 212

NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari
BRIEF FOR PETITIONER

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DONATO MARCONE, as Administrator of the Estate of Joseph Marcone, deceased,
Respondent.

On Writ of Certiorari

BRIEF FOR PETITIONER

This action was brought under the Federal Employers' Liability Act to recover damages for the death of Joseph Marcone, respondent's intestate, an employee of petitioner. He was killed at petitioner's roundhouse at Granton, New Jersey, being run over by the tender of petitioner's engine No. 3709, while that engine was being backed from Stall 8 of the roundhouse to the adjacent turntable, a distance of 68.3 feet (see Ex. D-1 opposite R. p. 120).

On May 7, 1928, respondent recovered judgment against petitioner in the Circuit Court of Hudson County, New Jersey (R. pp. 115-116), and on February 4, 1929, the Court of Errors and Appeals, the Court of Last Resort of that State, affirmed the judgment (R. p. 122) by a divided Court, eight Judges voting to affirm and three to reverse (R. p. 125).

The opinion of the Court of Errors and Appeals (R. p. 120) is reported in New Jersey Advance Reports, Volume 7, No. 7, p. 318, and in 144 Atl. 635. The case has not otherwise been reported.

On February 14, 1929, petitioner's motion for leave to file a petition for rehearing was granted, and the record was ordered held in the Court of Errors and Appeals pending the determination of the application for rehearing.

Notwithstanding the order to hold the record, it was inadvertently remitted to the Circuit Court of Hudson County. Thereupon, on due notice, on March 21, 1929, the Court of Errors and Appeals ordered the Hudson County Circuit Court forthwith to return said record to the Court of Errors and Appeals, to be retained by that Court until its further order (R. p. 123).

By order entered April 19, 1929, the Court of Errors and Appeals denied and dismissed the petition for rehearing (R. p. 123).

On July 1, 1929, petitioner filed its petition herein for a writ of *certiorari* and by order entered October 21, 1929, said petition was granted (R. p. 128).

The Issue

The negligence alleged in the complaint is petitioner's failure to use reasonable care to keep the locomotive No. 3709 under control; to give warning of the movement thereof; to keep same in proper and suitable condition as to brakes, appliances, etc., so it could be stopped by reasonable care in time to avoid injury to the intestate of plaintiff; that petitioner did not use reasonable care to equip said locomotive with suitable headlight or any headlight, and did not use reasonable care to propel same at a safe rate of speed (R. p. 1, fol. 2).

The answer denies all allegations of negligence, and, as affirmative defenses, alleges that the injuries sustained by decedent arose out of his negligence in going and standing upon defendant's railroad track at a time when it was unnecessary, improper and obviously dangerous for him so to do; that at the time of the accident decedent was a mere licensee and at said time he was not engaged in interstate commerce (R. p. 2, fol. 3).

In the charge the Trial Court excluded from the consideration of the jury all allegations of petitioner's negligence except the single charge that "defendant did not give warning of the movement of this locomotive" (R. p. 108, fol. 118). The Court also instructed the jury that "if plaintiff recovers, or is entitled to recover, he must recover because he shall have made out by the greater weight of the evidence the charge of negligence which he relies upon, that is, that the defendant did not give warning of the movement of this locomotive, and that that negligence was the proximate cause of this accident. * * * If he has not made

that out, manifestly he ought not to have a verdict and the verdict should be, under such circumstances, for the defendant" (R. p. 109, fol. 119).

Grounds of Jurisdiction of this Court

1. The Court of Errors and Appeals of New Jersey has decided Federal questions of substance in a way probably not in accord with applicable decisions of this Court, to wit:

(a) The State Court erroneously decided that the evidence warranted a finding of negligence on the part of petitioner.

(b) The State Court erroneously decided that the evidence warranted a finding that at the time of the accident decedent was engaged in interstate commerce.

(c) The State Court erroneously decided that the evidence warranted a finding that decedent's death was not due to his own negligence.

2. Among the cases sustaining the jurisdiction of this Court are:

Missouri Pacific R. R. Co. v. *Aeby*, 275 U. S., p. 426;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Chicago, M. & St. P. R. Co. v. *Coogan*, 271 U. S., p. 472;
Gulf, M. & N. R. Co. v. *Wells*, 275 U. S., p. 455.

Summary of Facts

Plaintiff's intestate belonged to an inspection gang. This gang inspected engines and made minor repairs and adjustments thereto. Siddell was its leader (R. pp. 62-63). After the gang began work, Siddell was in full charge and he alone gave directions to the men (R. p. 93, fols. 100-101).

Decedent had been a member of this night gang for about a year. He had come from a similar day gang (R. p. 65, fol. 70; p. 93, fol. 100). The hours of work were from 7 P. M. to 3 A. M., with an intermission at 11 P. M. for supper (R. p. 93, fol. 101).

Decedent was a box-packer and his work was to pack journal boxes on the engines, removing the old packing and replacing it with new, and when directed by Siddell, to fill grease cups (R. p. 63, fol. 68; p. 65, fols. 70-71). His place of work was confined to the Granton roundhouse (R. p. 66, fol. 71).

At the time of the accident, the procedure with respect to these engines was that after being inspected and as and when needed for service, hostlers backed them out of the roundhouse onto the adjacent turntable (See Ex. D-1 opposite p. 120). There they were turned and taken by the hostlers to a water plug. One witness only testifies to the distance from the turntable to the water plug, and he at one time states the distance to be 300 feet and at another time 300 yards (R. p. 23, fol. 26; p. 88, fol. 94).

The hostlers left the engines at the water plug and there the engine crews took charge of them and put them into the

service to which they had been assigned (R. p. 23, fol. 26; p. 88, fol. 94).

On the night of the accident engine No. 3709 had been inspected and all work on it had been completed before eleven o'clock P. M., or about four hours before the accident. Decedent then had nothing more to do that night on that engine (R. p. 66, fol. 71).

In the usual course of the operations at the roundhouse, hostler McGee, at about 2:30 A. M., backed engine 3709 out of stall No. 8 of the roundhouse over track No. 8 toward the turntable. While so doing, the tender of that engine ran over and killed decedent.

On that night, prior to the accident, decedent had worked on 14 engines, the last one was No. 3835 located on Track 7 (R. p. 63, fol. 68).

At about 2:15 A. M., all the inspection gang, except decedent, had finished their work on engine 3835. Siddell had some work to do outside the roundhouse at a place called "the farm." He told decedent to finish his work on engine 3835 and wait until he (Siddell) returned from the farm (R. pp. 66-67, fol. 72). Siddell then took the other members of the gang and went to the farm. He left the roundhouse about 2:15 and returned about 2:35, or 2:40 (R. p. 64, fol. 69; p. 98, fol. 105).

When Siddell told decedent to wait his return from the farm, that meant he should wait at the inspection wagon where the men congregated at the end of their night's work and prepared to leave the roundhouse (R. p. 94, fol. 101; p. 95, fol. 102).

The tools and supplies of the gang were carried on the inspection wagon which was moved from engine to engine as their work progressed, over a concrete floor about 10 feet wide, which extended in front of the engine stalls around the entire circumference of the roundhouse. Decedent's tools and supplies were carried on this wagon (R. pp. 67-68, fols. 72-73; p. 94, fol. 102).

When Siddell left for the farm and when he returned the inspection wagon was on the concrete floor in front of the engine stalls opposite the open space between tracks 7 and 8 (R. p. 94, fols. 101-102; p. 98, fol. 106). The inner edge of the concrete floor is 82.3 feet from the rear of the engine stalls (Exhibit D-1 opposite page 120).

When Siddell returned from the farm he went to the inspection wagon and began making out his report of the night's work (R. p. 90, fol. 97). Decedent was not there. As soon as Siddell learned of the accident he took a torch and examined engine 3835 to ascertain whether decedent had finished his work. He found decedent's work was all done (R. p. 91, fol. 98; p. 65, fol. 70; p. 68, fol. 74).

Siddell found all of decedent's tools in their proper place on the inspection wagon (R. p. 91, fol. 98). Evidently decedent had placed them there after finishing his work on engine 3835. No one else was there to do this. Siddell had not assigned any work to decedent after he had finished his work on engine 3835. He had no other work for him to do that night (R. p. 68, fol. 74; p. 99, fol. 106).

Between the time Siddell left to go to the farm and his return to the inspection wagon, decedent had nothing to do on track 9 (R. p. 92, fol. 99).

Hostler McGee was called as a witness by plaintiff and on direct examination he described in some detail his movement of this engine (R. pp. 23 to 34). On cross-examination, the witness gives a clearer, more detailed and more connected statement of the movement of the engine in which the sequence of events is much better presented (R. p. 47 to the middle of p. 53; pp. 54-55, fol. 59).

The substance of McGee's testimony is that he came to the roundhouse at about 2:20 a.m.; that he walked to the rear of engine 3709 in stall 8. At that time no one was at the rear of the tender. He then walked along the left hand side of that engine to the front, adjusted the cylinder cocks, passed in front of the engine and walked along its right side to the rear. While on his way, he removed the chains which blocked the main drive wheels. As he did so, he looked to see if there were any obstructions there or anyone working underneath it. He saw no obstructions and no one underneath or around the engine. He looked, but saw no one working on the engine on track 7 or on track 9. He then mounted 3709 on the right side, started the air compressor, turned on the lights, consisting of headlight, cab lights and rear light on the tender, about twelve in all. He then started the bell which was rung continuously by compressed air.

After the air compressor had been operated from 5 to 7 minutes, he blew three blasts of the whistle. *This was the back-up signal, and indicated that the hostler was about to back the engine on to the turntable.* It was then the duty of the turntable operator to set the table. Up to that time the engine had not been moved.

When McGee crossed the turntable on his way to stall 8,

he told the operator he was going to bring out an engine on track 8. The operator was then in the pit, cleaning it out and oiling the rail. He replied that he would be ready when the engine got to the turntable.

McGee blew three blasts of the whistle and started to back the engine out, moving it about four miles per hour. The turntable operator was still in the pit and did not set the table. McGee stopped his engine with the rear of the tender about thirty-five feet from the rear of the engine stall and waited for the operator to set the table. When the table was set, McGee again blew three blasts of the whistle and again started the engine back toward the turntable, again moving it about four miles per hour.

Just before McGee started the engine, and during the entire movement, he was looking backward along the track and saw no one. As he sat in the cab, the tender cut off his view of the track for about twelve feet. He looked for men around the engine, but did not see anyone (R. p. 34, fol. 37; p. 52, fol. 56).

After starting the engine the second time, McGee received a stop signal from the turntable operator. He immediately applied his brakes, got down from the engine and discovered the body of decedent lying on the right side of the tender, the legs and all of the body except the shoulders being on the outside of the right hand rail of track 8, adjacent to track 9. About half of the body was on the turntable (R. p. 30, fols. 33-34; p. 32, fol. 35; p. 76, fol. 82; p. 78, fol. 84).

About an hour after the accident, McGee tried to locate

the place where decedent was hit. He found blood stains about thirty feet from where the body lay, and about thirty-two feet from the rear of the engine stall. He states that the blood stains were between the rails (R. pp. 32-33, fol. 36) and on the right hand rail. They extended about thirty feet from the turntable toward the roundhouse (R. p. 77, fol. 83). He also saw marks along the outside of the right hand rail of track 8, about thirty feet from the turntable. These marks started right opposite the first of the blood spots (R. p. 78, fol. 84).

Siddell, the gang leader, testified that he saw blood stains on the right hand rail, and as nearly as he could remember about fifteen or eighteen feet from the rear end of the engine stall. He saw marks on the outside of the ties as if something had been dragging. These marks were from three to five feet towards the turntable from the place where he saw the blood stains (R. p. 92, fol. 99). He also saw a cap lying inside of the right hand rail of track 8, about five or six feet toward the turntable from the place where he saw the marks (R. pp. 92-93, fol. 100).

Bechtol, an employe at the roundhouse, learned of the accident some time after it happened and went to the turntable. He says he saw the body of decedent underneath the tender, lying on the turntable. The engine was then standing still and he thought it was about three-quarters of the way on the turntable (R. p. 8, fols. 9-10). He removed the body from underneath the tender. Before he removed it, it was lying on the right hand side across the track (R. p. 9, fol. 11). He did not trace any blood stains. He was looking for decedent's lantern but could not find it, but he did locate a cap about fifty feet from the body

and twelve to fifteen feet from the rear of the roundhouse. The cap was between the tracks (R. p. 9, fol. 11).

He did not notice any part of the body outside the rails (R. p. 15, fol. 18). The body "was coming from under the truck toward the center of the tender" (R. p. 17, fol. 20).

Maloy, the turntable operator, set the turntable for engine 3709. He did not set the turntable at the first signal of three blasts of the whistle because he was cleaning out the pit and oiling the rail (R. p. 56, fol. 61).

When McGee blew the second signal of three blasts he was turning the table around (R. p. 57, fol. 62). After setting the table, he gave the signal to back up. He was watching the engine as it came back and noticed something dragging, and gave McGee the stop signal. He looked to see if the engine was off the track. Looking underneath the tender he saw decedent's body (R. pp. 57-58, fols. 62-63).

McGee crossed the turntable to go to stall 8, and as he was crossing he told Maloy he was going to bring the engine out on track 8. He heard the signal of three blasts of the whistle, which was the back-up signal (R. pp. 58-59, fols. 63-64). He also heard the engine bell ringing (R. p. 62, fol. 67). There was a tail light on the tank. When he got out to set the turntable, the rear of the tender was outside the doors of the roundhouse about three feet, and he was standing on the turntable (R. p. 59, fol. 64).

After the engine stopped, he found the body of decedent on the right hand rail of track 8. He locates the position of the body by a cross on the diagram of the engine, Exhibit D-1, between the first and second wheels at the rear of the tender (R. p. 60, fol. 65).

The engine was moving very slowly—"About a nice walk is all" (R. p. 61, fol. 66).

Both McGee and Siddell testified that none of decedent's tools was found along track 8, where the accident happened. They were all in place on the inspection wagon ready for removal from the round house at the end of the eight-hour period which would occur in about 15 minutes (R. p. 77, fol. 83; p. 91, fol. 98).

Errors Relied On

At the close of plaintiff's case, defendant moved for judgment of non-suit, and at the close of the entire case, moved for a directed verdict in its favor. Petitioner contends that the Trial Court erroneously overruled both motions (R. pp. 74-75, fols. 80-81; p. 106, fols. 114-115).

These errors were stated as grounds of appeal in the State Court (R. p. 117).

The motions so overruled were in part based on the following grounds:

1. That at the time of the accident plaintiff's intestate was not engaged in interstate commerce.

2. That no negligence had been established against defendant.

3. That the negligence alleged in the complaint had not been established against defendant.

4. At the time of receiving the injuries resulting in his death, plaintiff's intestate was not acting in the scope of his employment.

5. The injuries resulting in the death of plaintiff's intestate arose out of his negligence.

6. The proximate cause of the death of plaintiff's intestate was his negligence.

7. The injuries resulting in the death of plaintiff's intestate were received at a place where his duties to defendant did not require him to go (R. pp. 74-75; p. 106).

In this Court, petitioner relies on these errors as grounds for reversal.

SUMMARY OF ARGUMENT

1. No negligence was established against the petitioner.

2. At the time of the accident decedent was not engaged in interstate commerce.

3. Decedent's death was due solely to his own negligence and to his disobedience of orders.

POINT I

No negligence was established against petitioner

As to petitioner's negligence, the sole question submitted to the jury was, Did defendant move engine 3709 without warning to decedent (R. p. 108, fol. 118; p. 109, fol. 119)?

The undisputed evidence is that the whistle was sounded and the bell was rung just prior to the starting of the engine, and that the bell was rung by compressed air during the whole movement (R. p. 26, fol. 29; p. 51, fol. 55; p. 62, fol. 67). This conformed to the established system for warning workmen in the roundhouse that an engine was to be moved (R. p. 39, fol. 42).

In its opinion the State Court said:

> "As to the contention that there was no negligence shown, the specific negligence alleged in the complaint, and upon which the Court submitted the case to the jury, was that engine No. 3709 was moved without warning in disregard of a posted notice that it would be moved at three o'clock; that it was actually moved out of the roundhouse between 2:20 and 2:30 o'clock; and that the hour of its movement was posted for the express purpose of apprising the workmen when it would be moved. It seems to have been established that a whistle was blown and the bell was rung on the engine, but the evidence is that this as a warning was inadequate because whistles and bells were sounding 'around there' at all times. The engine backed out of the roundhouse in advance of the time posted with no one on its rear" (R. p. 121, fol. 137).

But the question of the alleged premature moving of the engine, or its movement in disregard of the time stated in a posted notice, is not in this case. Both questions were eliminated by the charge of the Trial Court by limiting the question of defendant's negligence to the single charge that the engine was moved without warning to decedent.

The State Court concedes that the engine whistle was sounded and the bell was rung before the engine was moved, but finds that these warnings were insufficient because "whistles and bells were sounding 'around there' at all times" (R. 121, fol. 137).

We submit that there is no evidence that these warnings were insufficient, and that the Court was not justified in determining that they were. Still less was the Court justified in holding that under the circumstances, backing the engine out of the roundhouse *without a guard on the rear* permitted the jury to charge defendant with negligence.

The operating officials of the Railroad Company are far better qualified to determine what constitutes adequate warning than either witnesses or the Courts. A Railroad Company must be allowed much freedom of choice in the matter of providing safe working places for its employees. This includes establishing a system of signals as a warning of impending movements of its rolling stock. The principle upon which the decisions in *Toledo, St. Louis & Western R. Co.* v. *Allen,* 276 U. S. 165, and *Delaware, Lackawanna & Western R. Co.* v. *Koske,* 279 U. S. 7, are based, are applicable to the giving of warnings in this case.

In *Toledo, St. Louis & Western R. Co.* v. *Allen,* plaintiff was employed by the Railroad Company as a car checker. He was obliged to perform his duties in a freight yard where switching was going on.

At the time of the accident, he was checking a string of cars on track 5 and was between that track and track 4. A switching crew sent two cars by a flying switch along track

4 to the place where plaintiff was struck. The Trial Court permitted the jury to find defendant guilty of negligence if the space between tracks 4 and 5 was found to be so narrow that when track 5 was occupied, plaintiff was in danger of being struck by cars moving on track 4.

This Court said (p. 170):

> "The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt or maintain any particular standard for the spacing or construction of its tracks and yards. *Baltimore & O. R. Co.* v. *Groeger*, 266 U. S. 521, 529, 69 L. ed. 419, 424, 45 Sup. Ct. Rep. 169. Carriers, like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries."

In *Delaware, Lackawanna & Western R. Co.* v. *Koske*, plaintiff was injured by jumping from a switch engine. He landed in a shallow open ditch or trench which drained a part of defendant's yard, the ditch or depression being in depth from 8 to 11 inches and in width from 8 to 24 inches. This ditch being uncovered, it was charged that the place of work provided for the plaintiff was not reasonably safe.

This Court said (p. 236):

> "There is no evidence that the open drain was not suitable or appropriate for the purpose for which it was maintained or that there was in use by defen-

dant or other carriers any means for the draining of railroad yards which involve less of danger to switchmen and others employed therein. Defendant was not bound to maintain its yard in the best or safest condition; it had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters, or leave engineering questions, such as are involved in the construction and maintenance of railroad yards and the drainage systems therein, to the uncertain and varying judgment of juries. *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165."

Had decedent been entitled to warnings in addition to the ringing of the bell and the blowing of the whistle (which we deny), the evidence discloses other warnings which were ample to notify him that the engine was about to be moved.

When the hostler, McGee, boarded the engine, he set the air compressor pump going immediately, and it continued to operate until he left the engine after the accident. The compressor made a noise which could be heard at least 30 or 40 feet. He next turned on the head light, cab lights and rear light on the tender, about 12 in number, thus lighting up the whole engine. He waited until he got 50 pounds air pressure before moving the engine. That took from 5 to 7 minutes, and he was on the engine 10 minutes with the compressor going and lights on before he moved it (R. pp. 26-27, fols. 29-30; pp. 50-51, fols. 54-55). The rear light on the tender was a big light (R. p. 34, fol. 37; p. 62, fol. 67).

The engine lights are not turned on and the air compressor is not started by the hostler until he is about to move the engine (R. p. 51, fol. 55).

Decedent must have been close to the engine before it started. Everything about it—compressor pump, bell, whistle, lights, the hostler on board—all were plain indications that the engine was about to be moved. In the absence of the hostler, the compressor would not be working nor would the lights be on (R. p. 51, fol. 55).

Being close to this engine, decedent could not have been confused as to the source of the signals by bell and whistle, or as to their well known meaning that the engine was about to be moved. Furthermore, there is no evidence that whistles were sounded or bells ringing on any nearby engines at that time, certainly none were sounding or ringing on engines on track 7 or 9 as no work was then being done on either, and no workmen were near either.

As already pointed out, whether the engine was prematurely moved or not was eliminated from the case by the charge of the Court. Had it been in the case the evidence does not sustain the conclusion of the Court below that the posted notice with respect to the movement of the engine *fixed the time for its movement out of the roundhouse at 3 o'clock.* The evidence with respect to the time posted on the blackboard is uncontradicted, and is to the effect that the time there posted was the time when the engine crew were to take possession of the engine at the water plug, and not when the hostler was to back it out of the roundhouse. The time thus posted, therefore, could not have been any guide to the men working in the roundhouse as to the time when the hostler would back the engine on to the turntable.

The witness Weiss was first asked when the engine *would leave the roundhouse,* and before that question was

answered, the form was changed and he was asked if the record he produced showed when the engine was to be taken out of the roundhouse. Evidently having in mind the unanswered question, he replied, "Three o'clock in the morning" (R. p. 20, fol. 23). Later he explained that the time shown by the records he produced and testified from was the time when the engine crew were ordered to depart with the engine from the engine house; that his records showed that time to be three o'clock A.M.; that he had no record of the time it was to be backed out of the roundhouse—that his records had nothing to do with the movement of the engine out of the roundhouse on to the turntable (R. pp. 22-23, fol. 25).

The turntable is a part of the roundhouse. It is therefore quite true that the engine was to be *ready to leave the roundhouse in charge of the engine crew* at 3 o'clock A. M.

Kelly, the Assistant Foreman of the Roundhouse, also testified that the time posted on the blackboard was the time the engine was scheduled to leave the yard, not when it was to be taken out of the roundhouse (R. pp. 42-43, fol. 46).

McGee, the hostler, testified that "the crew was supposed to get on the engine at three o'clock," meaning the engine crew (R. pp. 80-81, fol. 87).

The engine was not prematurely moved from the engine stall, but was moved at the usual and customary time (R. p. 100, fols. 107-108).

It was customary to back an engine out of the roundhouse to the turntable a half hour or an hour before it was scheduled to leave in the custody of the engine crew (R. p. 100, fol. 108).

The directions to hostlers not to take the engines out of the roundhouse too early was to avoid congestion at the water plug, where the engines were taken in charge by the engine crews, and had no relation whatever to the time when they were to be moved out of the roundhouse (R. p. 46, fol. 49).

No one acting for defendant knew or had reason to suppose that decedent was in a place of danger when the engine was moved; hence, there was no duty to give him any special warning or to exercise any special care for his protection, such as placing a guard on the rear of the tender, as suggested in the opinion of the State Court.

In *Chesapeake & Ohio R. R. Co.* v. *Mihas,* 50 Sup. Ct. Rep. 42, Mihas cared for switch lights along the railroad right of way. While crossing the tracks to get his speed car which he used in his work, he climbed over a coal car standing with others on a switch. While doing so, other cars moving in a flying switch were driven against the standing cars and he was injured.

The negligence complained of, among other things, was that contrary to custom, this switching movement was performed without warning. It appeared, however, that the warning customarily given was for the protection of persons unloading standing cars and that no duty of warning was owed to plaintiff when crossing the tracks.

This Court said (p. 95):

> "There is nothing in the record to show that employees engaged in the switching operation knew or had reason to believe that Mihas was in any position of danger. In the absence of such knowledge

> or ground for belief, they were not required to warn him of the impending switching operation or to take other steps to protect him. *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165, 173, 72 L. ed. 513, 517, 48 Sup. Ct. Rep. 215."

The judgment cannot be sustained on a theory different from that on which it was submitted by the Trial Court to the jury. The charge of that Court having limited petitioner's negligence to the failure to give decedent warning of the impending movement of the engine, the judgment cannot be sustained upon the theory that the engine was prematurely moved.

> *Delaware, Lackawanna & Western R. Co.* v. *Koske,* 279 U. S. 7.

Not only were adequate warnings given to decedent but within about ten minutes before the engine was moved, careful observations were made all around and underneath the engine to ascertain whether any workmen were around it or whether any work was being done on it.

McGee approached the engine from the rear as it stood in the engine stall, passed along the left side adjacent to track 7 to the front of the engine, crossed to the right side, walked down that side to the rear, removed the chains blocking the drive wheels, looked underneath the engine, walked to the rear on the right side and then returned to the cab. No one was working on engine 3709 (R. pp. 47-50, fols. 51-55), or on the engines standing on tracks 7 and 9 (R. p. 25, fols. 27-28; pp. 54-55, fol. 59; p. 89, fols. 95-96).

After this inspection, McGee entered the engine cab, turned on the lights and set the air pump in motion. He

was on the engine about ten minutes before starting to back it out. During the entire movement he was looking backward towards the turntable and saw no one (R. p. 34, fol. 37; p. 52, fol. 56). Evidently decedent came into a position of danger after McGee had entered the engine cab. After he had entered the cab, everything about the engine clearly indicated that it was soon to be moved.

Petitioner had performed every duty which it owed to decedent.

There was no eye witness to the accident. No one saw or knows how decedent came to be struck or how or why he came to the place of the accident. Evidently he was struck on the right side of the engine, adjacent to track 9, and at or close to the rear of the tender. How or why he came there does not appear. How the accident happened no one knows. This whole matter is left in the realm of speculation and conjecture. This is insufficient to sustain the judgment.

> *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Coogan*, 271 U. S. 472 (at p. 478), and cases cited.

When circumstantial evidence is relied upon, the circumstances must be proved, they cannot be presumed. *Manning* v. *John Hancock Mutual Life Insurance Co.*, 100 U. S. at p. 697; *Chicago, etc. R. R. Co.* v. *Coogan*, 271 U. S. at page 477; *Price* v. *New York Central R. R. Co.*, 92 N. J. L., at p. 432.

In *McCombe* v. *Public Service Railway Co.*, 95 N. J. L. p. 187 (New Jersey Court of Errors and Appeals), action was brought to recover for the death of plaintiff's intestate

whose body was found near midnight lying on defendant's track, badly mutilated. There were no eye witnesses to the accident. No one saw how it happened. The Court said (p. 189):

> "But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. *Price* v. *New York Central R. R. Co.*, 92 *id.* (N. J. L.) 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the only conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence."

In *Adriance* v. *Palisade Realty and Amusement Company et als.*, 95 N. J. Law 185 (N. J. Court of Errors and Appeals), plaintiff was riding with two companions in a racer operated by defendant. Toward the end of the second ride something happened and plaintiff ceased to remember anything. A few minutes before the accident, one of plaintiff's companions had spoken to him. The next he saw was that "plaintiff was doubled up, bleeding." No one saw what caused his injury.

The Court said (p. 186):

> "The facts disclose an injury which is admitted, but do not disclose how it happened and no one gave any testimony on the point."

In *Alvino* v. *Public Service Railway Co.*, 97 N. J. L., p. 526 (N. J. Court of Errors and Appeals), suit was brought to recover for the death of plaintiff's intestate arising out of a collision between a motorcycle and defendant's trolley

car. No one testified to having seen or heard any collision. Decedent's wife testified that she saw him riding in the side car of a motorcycle. A witness who lived about one hundred feet from the place of the accident saw a motorcycle being driven along the Avenue and the next thing she heard was the shaking of the house and a grinding noise. Then she saw the dust and after that passed she saw the motorcycle and went out and saw the car. Another witness saw two men lying unconscious on the roadside and the motorcycle was broken.

The Court said (p. 529):

> "It may fairly be said from this testimony an inference of fact could be drawn that there was a collision between the motorcycle and the trolley car; but, if so, how it happened or who was responsible for the collision is left entirely to conjecture. The record is silent on these essential points."

In *Patton* v. *Public Service Railway Co.*, 227 Fed. 810 (C. C. A., Third Circuit), decedent was found dead under the rear truck of a car on the Company's northbound track. The car had backed from a position north of the station toward a switch south of the station. The conductor was on the rear platform and was able to see a certain distance down the track, but saw no one. The car was lighted within and carried the customary forward and rear lights. The conductor felt a jolt, stopped the car and discovered decedent's body underneath it. The rear truck was off the track.

The negligence charged was that defendant's servants "backed the car at a reckless speed, without giving sufficient warning, and failed to exercise the care which the law requires of a carrier toward a passenger."

The Trial Court and the Court of Appeals assumed that decedent had been a passenger and that he remained such at the time of his death, and decided the case on the question of defendant's negligence.

On this point the Court said (p. 812):

> "No one saw the accident and no one knows, as a matter of fact, how it happened. The plaintiff contends that from the circumstances of the accident, negligence of the defendant must be inferred, that is, had the defendant not been negligent, the accident would not have occurred. When or how the plaintiff's husband got upon the track between the two rails is not disclosed. Whether he heard the bell ordering the car to back or whether he saw the lighted car in time to avoid his peril, is not shown. Whether the car knocked him down, or whether he fell down and while in the forward position in which his body was found, was run over by the car, is a mystery. * * * In fact, it is not shown how the accident occurred. * * * The learned trial judge was entirely without error in withdrawing from the jury a case in which a verdict for the plaintiff could not have been sustained by the evidence."

This case is brought under the Federal Employers' Liability Act and is governed by that Act and by the principles of the common law as applied in the Federal Courts.

> *Missouri Pacific R. R. Co.* v. *Aeby*, 275 U. S., p. 426 (at p. 429);
> *Toledo, St. Louis & Western R. Co.* v. *Allen*, 276 U. S., p. 165 (at bottom p. 169).

This Court will examine the record and if found as a matter of law that the evidence is not sufficient to sustain

a finding that petitioner's negligence was the cause of death, the judgment of the State Court will be reversed.

Chicago, Milwaukee & St. Paul R. Co. v. *Coogan*, 271 U. S. 472 (at p. 474).

Where there is but a mere *scintilla* of evidence, the State Court, in actions brought under the Federal Employers' Liability Act, is required to follow the rule established in the Federal Courts and order a non-suit, or direct a verdict for defendant.

Baltimore & Ohio R. Co. v. *Groeger*, 266 U. S., p. 521;
Gulf M. & N. R. Co. v. *Wells*, 275 U. S. p. 455;
Toledo, St. Louis & Western R. Co. v. *Allen*, 276 U. S., p. 165;
Western & Atl. R. Co. v. *Hughes, Admx.*, 278 U. S. 496.

Not only did respondent fail to establish any negligence against petitioner, but the evidence clearly disproves any negligence on its part.

In *Atlantic Coast Line R. R. Co.* v. *Driggers, as Admx., etc.* (decided by this Court June 3, 1929), 73 L. Ed. (Advance Opinions), p. 556, decedent was a member of a switching crew who were moving cars in a southerly direction from a siding onto the main northbound track of defendant. As the train came out onto the main northbound track decedent was riding on the front foot board of the engine and was facing south. As the engine approached the switch and moved southerly on to the north bound track, a passenger train approached on the adjoining south bound track. De-

cedent could not see this train without turning and looking back. He jumped from the engine, landing between the tracks and was killed by the passenger train.

It was not necessary at that time for decedent to leave the engine.

This Court held that the Railroad Company was not liable and said (p. 558):

> "Under these circumstances, it is clear that Driggers, by his own negligence, as the sole and direct cause of the accident, brought on his own death, and that there is no ground upon which the liability of the railroad company may be predicated. Compare *Atlantic Coast Line R. Co.* v. *Davis, supra* (279 U. S. p. 39, 49 Sup. Ct. Rep. 210); and cases cited."

POINT II

At the time of the accident decedent was not engaged in interstate commerce.

Under the Federal Employers' Liability Act, the question whether decedent was engaged in interstate commerce is to be determined by the nature of the work being done at the time of the accident.

Illinois Central R. R. Co. v. *Behrens,* 233 U. S. 473;
Erie R. R. Co. v. *Welsh,* 242 U. S. 303.

At the time of the accident, decedent was not engaged in any work. He was struck on the right hand side of

Track 8, adjacent to Track 9, probably at a distance of at least 15 feet from the rear of the engine stall. This point was distant about 100 feet from the inspection wagon located on the concrete floor in front of the engine stalls where, after completing his work on engine 3835, he had been directed to await the return of Siddell. His work on Engine 3709 had been completed at least four hours before the accident, and after completing his work on Engine 3835 he had nothing further to do on any engine unless Siddell gave him further orders, and none were given. Siddell had nothing further for him to do, that night (R. p. 99, fol. 106).

All his tools were on the inspection wagon ready for removal from the roundhouse at the end of his night's work, and no tools of any kind were found along tracks 7, 8 or 9 (R. p. 91, fol. 98).

At the time and place of the accident it is clear that he was neither engaged in interstate commerce nor within the scope of his employment. Under such circumstances, plaintiff had no right of recovery.

In *Harbor* v. *Jenkins Rubber Co.*, 72 N. J. L. 171, plaintiff was returning to his place of work after noon recess. He was proceeding along a proper pathway on the employer's premises when his attention was called to a glittering object, and he departed from that pathway by a distance of about 50 feet to pick it up. While off the pathway he was injured. The Court said:

> "He was therefore neither working for the defendant company at the time nor proceeding to the place where he was to work with the intention of resuming work. When he deviated from the path,

> the use of which it might possibly be considered he was invited to make, he lost the protection of such implied invitation and became either a trespasser, or, at the most, a mere licensee, to whom the defendant company owed no duty except to abstain from willful injury."

The judgment of nonsuit was affirmed.

In *Harris* v. *U. S. S. Co.*, 75 N. J. Law 861, plaintiff's decedent, a longshoreman, was assisting in unloading a vessel. While thus employed, it became necessary for him to have a shovel and he called to a co-employee, whose duty it was to supply tools for the longshoremen, to provide a shovel. Without waiting for the shovel to be brought, decedent left his place of work to procure a shovel for himself and while doing so fell into a coal hole and was killed. The Court said (at page 864):

> "When Harris, with such knowledge, of his own volition and without the knowledge of the defendant, departed from the safe place provided and occupied a dangerous place for the purpose of getting a shovel which the defendant was in the act of providing, he became either a trespasser, or, at the most, a mere licensee, to whom the defendant owed no duty except to abstain from willful injury, unless his action was justified by a custom of which the defendant knew or ought to have known."

There being no proof of such a custom, a judgment in favor of the plaintiff was reversed.

If decedent was attempting to leave the roundhouse, assuming that he might properly do so before Siddell's return (which was not the fact), he had a perfectly safe

course along the concrete floor in front of the engine stalls which was ten feet wide. Instead of using that way, he voluntarily chose a dangerous way and was struck in a position at the rear of the tender of engine 3709, where he had no reason or right to go.

In *Krysiak* v. *Penn. R. R. Co.*, 270 Fed. 758 (C. C. A. Third Circuit), plaintiff's intestate had been employed in interstate commerce during the day and in leaving his place of employment to go home chose a dangerous way leading across the company's tracks, instead of the safe way provided by his employer. While using that way he was injured.

The Court said (page 760):

> "At that moment, we think, Krysiak ended his employment and lost the status of an employe in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns."

To the same effect is *Atlantic Coast Line R. Co.* v. *Davis, Adm.*, 279 U. S. 34. In that case decedent at first took a perfectly safe position in which to give signals for spotting cars. He then voluntarily took a dangerous position and while there was killed. This Court said that he "thereby through his own negligence, as the sole and direct cause of the accident, brought on his own death."

POINT III

Decedent's death was due solely to his negligence and to his disobedience of orders.

Contrary to Siddell's direction, decedent voluntarily left a place of safety at the inspection wagon and went to a place of danger around the rear of engine 3709, about 100 feet from where he had been told to remain, and where his duty to petitioner did not require him to go. Under those circumstances, petitioner owed him no duty except to refrain from wilfully injuring him.

In *Great Northern Ry. Co.* v. *Wiles, as Admr.*, 240 U. S. 444, decedent was a rear brakeman on a freight train. The drawhead pulled out of one of the cars and this caused the train to stop. Shortly afterwards, it was run into by a following express train and decedent was killed.

When the train broke in two, it was the duty of decedent immediately to go back and protect the train and the engineer gave the usual signal for him to do so. He failed to protect the train and the collision resulted.

This Court held that by reason of his failure to regard the signals of the engineer and to perform his duty, there could be no recovery, even though negligence could be imputed to the carrier from the pulling out of the draw bar.

In *Frese* v. *C. B. & Q. R. Co.*, 263 U. S. 1, decedent was an engineer in the employ of the Railroad Company. Under a statute of the State of Illinois he was required on approaching a grade crossing of railroads to bring his train

to a full stop before reaching the crossing and to ascertain positively that his train could safely resume its course before proceeding over the crossing. He brought his train to a stop but did not ascertain that he could safely proceed over the crossing. His engine was struck by a train approaching on the other railroad and he was killed.

This Court held that there could be no recovery, even though the train approached from the fireman's side and if the fireman had kept a proper lookout he would have seen the colliding train. The negligence of the fireman, if any, did not excuse the negligence of the engineer.

In *Davis* v. *Kennedy,* 266 U. S. 147, decedent was a locomotive engineer and it was his duty to ascertain definitely at a station known as Shops that train No. 1, approaching on a single track road, had passed that station. The conductor had asked him to look out for that train and decedent agreed to do so. Without ascertaining whether No. 1 had passed Shops, he ran his train beyond that station and the collision occurred.

This Court said (p. 148):

> "It was the personal duty of the engineer positively to ascertain whether the other train had passed. His duty was primary as he had physical control of No. 4, and was managing its course. It seems to us a perversion of the statute to allow his representative to recover for an injury directly due to his failure to act as required, on the ground that possibly it might have been prevented if those in secondary relation to the movement had done more."

To the same effect is *Unadilla Valley R. Co.* v. *Caldine, Admr.,* 278 U. S. 139.

In *Mehl* v. *Glucose Co.*, 83 N. J. Law, page 630, the Court said (at page 631):

> "When an employer forbids his employee to do a certain act in connection with the machine on which he is working, and the employee while violating such prohibition, and as a result therefrom, receives injury, the employer is not liable. *Card* v. *Wilkins*, 32 Vroom 296."

We respectfully submit that the judgment should be reversed.

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